# In the Supreme Court of the United States

OCTOBER TERM, 1946.

JOHN P. McWILLIAMS,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**No. 945.**

ESTATE OF SUSAN P. McWILLIAMS,
deceased,
JOHN P. McWILLIAMS, Executor,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**No. 946.**

BROOKS B. McWILLIAMS,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**No. 947.**

## REPLY BRIEF OF PETITIONERS.

JOHN V. HARPER,
QUINTUS ALEXANDER,
1882 Union Commerce Building,
Cleveland 14, Ohio.

## INDEX.


Reply Brief of Petitioners ..... 1

Addendum ..... 7


## TABLE OF AUTHORITIES.

### Cases.


*Commissioner v. Court Holding Co.*, 324 U. S. 331 ..... 1

*Commissioner v. Ickelheimer*, 132 Fed. (2) 660 ..... 6

*Crane v. Commissioner*, decided by this Court April 14, 1947 ..... 6

*Duel v. Hollins*, 241 U. S. 523 ..... 7

*Gorman v. Littlefield*, 229 U. S. 19 ..... 7

*Gregory v. Helvering*, 293 U. S. 465 ..... 1

*Griffiths v. Helvering*, 308 U. S. 355 ..... 1

*Gummey, Frank B.*, 26 B. T. A. 894 ..... 2, 3

*Higgins v. Smith*, 308 U. S. 473 ..... 1

*Minnesota Tea Co v. Helvering*, 302 U. S. 609 ..... 1

*United States v. American Trucking Ass'ns.*, 310 U. S. 534 ..... 1


### Statutes.


Internal Revenue Code:

Section 24(b) ..... 4

Section 24(b)(1)(A) ..... 2, 3, 4, 5, 7

Section 118 ..... 2, 3

# In the Supreme Court of the United States

**OCTOBER TERM, 1946.**

| | |
|---|---|
| JOHN P. McWILLIAMS, Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent. | No. 945. |
| ESTATE OF SUSAN P. McWILLIAMS, deceased, JOHN P. McWILLIAMS, Executor, Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent. | No. 946. |
| BROOKS B. McWILLIAMS, Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent. | No. 947. |

## REPLY BRIEF OF PETITIONERS.

Respondent's brief cites as authority for the proposition that sales took place *between*[1] the petitioners, the cases of *Griffiths v. Helvering*, 308 U. S. 355; *Minnesota Tea Co. v. Helvering*, 302 U. S. 609; *Gregory v. Helvering*, 293 U. S. 465; *Higgins v. Smith*, 308 U. S. 473; *Commissioner v. Court Holding Co.*, 324 U. S. 331; and *United States v. American Trucking Ass'ns.*, 310 U. S. 534. These cases have no bearing if Congress did not intend Section 24(b)(1)(A) to cover transactions similar to petitioners'. And it is apparent that Congress had no such intention in drafting that statute. This is clearly illustrated by the following:

[1] Emphasis ours throughout except as otherwise noted.

1. In seeking to determine the intended scope of Section 24(b)(1)(A) as contemplated by Congress it is pertinent to examine the circumstances under which it was enacted.[2] The case of *Frank B. Gummey*, 26 B. T. A. 894, decided in 1933, acquiescence XIII-2 C. B. 8, had been decided just prior to the convening of the 73rd Congress. In that case the Board of Tax Appeals held that the wash sale provision of Section 118 did not invalidate a deductible loss on a sale by the husband taxpayer which had been followed within 30 days by a purchase on the stock exchange of substantially identical securities by the wife. It was a case in which husband and wife had made a joint income tax return. If it had been the intention of the Treasury Department to seek a change in the law as laid down by the Board of Tax Appeals and in which it had acquiesced it would have been much more logical for the Treasury Department to propose to Congress an amendment of Section 118—the wash sales statute. It would have been a very simple matter for Congress to accomplish this result by inserting the words which we have interpolated, contained in the brackets in Section 118 as follows:

> "(a) In the case of any loss claimed to have been sustained from any sale or other disposition of shares of stock or securities where it appears that, within a period beginning 30 days before the date of such sale or disposition and ending 30 days after such date, the taxpayer [*or a related person as hereinafter defined*] has acquired * * * or has entered into a contract or option so to acquire, substantially identical stock or securities, then no deduction for the loss shall be allowed * * *."
>
> [There would follow a definition of "related person" which would include the members of the taxpayer's family etc. contained in subsection (2)(D) of Section 24(b).]

---

[2] The present Section 24(b)(1)(A) was originally enacted as a part of the Revenue Act of 1934, drafted by the 73rd Congress.

That Congress did not amend Section 118 in the above manner when the statute was ready to hand, and when the Board of Tax Appeals had held that it did not cover situations such as the instant cases, but chose rather to pass a new section, Section 24(b)(1)(A), which in its terms deals only with sales *between* taxpayer and members of his family, etc., must be accorded significance. It is persuasive evidence of two things, one that the Treasury Department did not have in mind and was not asking Congress to do away with the rule laid down in the *Gummey* case, *supra*, in which it had acquiesced. It is equally persuasive evidence that Congress did not intend to do away with the rule laid down in the *Gummey* case and acquiesced in by the Treasury Department.

It can be argued that just because Congress chose to enact a new statute—Section 24(b)(1)(A)—instead of amending Section 118 as we have suggested, is not conclusive proof that they did not intend to affect the law that had been laid down under Section 118 in the *Gummey* case in which the Commissioner had acquiesced. However, it will be noticed that there is no reference to Section 118 in Section 24(b)(1)(A), and if Congress had intended to affect the Board of Tax Appeal's interpretation of Section 118 it certainly is to be expected that they would have used language clearly indicating that intention. There was ready to hand accurate, tested language in Section 118, viz.: "Substantially identical property"; the fact that they did not use this language or synonymous language but chose rather "sales or exchanges of property directly or indirectly *between* members of a family," is again persuasive that Congress did not intend to change the law as the court had construed Section 118.

If Congress had so intended, it would also have designated a period of time beyond which losses on such transactions would be deductible. Section 118 covers purchase by the taxpayer of substantially identical property within

either 30 days before or after the sale. Similar provisions had been part of the law since the Revenue Act of 1921, where they first appeared, and they were well known to Congress. If Congress had intended to cover transactions similar to petitioners' in Section 24(b)(1)(A) (notwithstanding the failure to use therein the phrase "substantially identical property"), it is a reasonable assumption that a time limit would have been specified, and that it would not have been left to the courts to decide what period of time must elapse before the losses on such sales would be deductible.

2. There is further evidence that Congress did not wish to impinge upon the separate rights of husband and wife beyond the literal meaning of the words in Section 24(b). Throughout the years proposals for compulsory joint income tax returns for husband and wife have failed in Congress. As recently as 1941 and 1942 such a measure was overwhelmingly defeated in Congress despite strong support from the Treasury Department. Congress had always been opposed to such a measure. When Section 24(b)(1)(A) is considered in the light of this background, it is reasonable to conclude that Congress had no intention of writing a law which would in effect create a compulsory family unit embracing not only income but principal. This attitude of Congress against compulsory joint income tax returns should be persuasive to any court not to construe the words of Section 24(b)(1)(A) beyond their clear literal meaning.

3. There is no indication from Committee Reports or the Congressional Record that Congress meant to cover any sort of transaction other than that best typified by the Charles E. Mitchell case—direct sales between husband and wife, or indirect sales between husband and wife by means of a dummy third party—"boudoir sales." As stated by respondent, the validity of such sales depended on whether or not they were bona fide, and the evidence

in this respect was almost entirely within the control of the parties. Consequently it was extremely difficult for the government to establish that a sale was not bona fide. To remedy this situation, Congress passed Section 24(b)(1)(A), thus forbidding the deduction of losses on these private transactions. In order to cover the frequently followed practice of using a third person dummy, the word "indirectly" was included, and so that the section would not change the law as laid down in the *Gunfmey* case and embrace bona fide public sales, its coverage was restricted to sales *between* the parties, thereby expressly excepting publicly recorded sales to persons unknown through the medium of a stock exchange.

Respondent has cited no authority for its contention that the statute should be stretched beyond its literal meaning. There is none. The language from Committee Reports relied upon by the Circuit Court of Appeals in its opinion and by respondent in his brief does not support respondent's contention—it merely repeats the exact language of the statute:

> "Experience shows that the practice of creating losses through transactions *between* members of a family and close corporations has been frequently utilized for avoiding the income tax." H. Rep. No. 704, 73d Cong. 2d Sess. p. 1.

Respondent has cited nothing to show that Congress intended to extend the coverage of Section 24(b)(1)(A) beyond its express language—transactions *between* members of a family. The statute has effectively stopped the practices at which it was aimed—"boudoir sales." It should not be perverted to embrace transactions which Congress did not intend it to embrace.

4. The language of the statute negatives any such intention—it forbids deductions only on losses "from sales or exchanges of property directly or indirectly * * * *between* members of a family * * *." The record clearly

shows that nothing ever passed *between* any of the petitioners. In the case of *Crane v. Commissioner*, decided by this Court April 14, 1947, the Chief Justice said "* * * the words of statutes—including revenue acts—should be interpreted where possible in their ordinary, everyday senses."

The language of the Second Circuit Court of Appeals in *Commissioner v. Ickelheimer*, 132 Fed. (2) 660, 661, is most pertinent here:

> "Had Congress intended to strike down losses realized by a bona fide sale executed on a public exchange in case a member of the seller's family should purchase similar securities shortly thereafter, *we think that language more apt for the purpose would have been employed.*"

The judgment of the Circuit Court of Appeals should be reversed and the judgment of the Tax Court should be affirmed.

Respectfully submitted,

JOHN A. HADDEN,
QUENTIN ALEXANDER,
1882 Union Commerce Bldg.,
Cleveland 14, Ohio,
*Counsel for Petitioners.*

## ADDENDUM.

On pages 18 and 19 of respondent's brief the cases of *Gorman v. Littlefield*, 229 U. S. 19, and *Duel v. Hollins*, 241 U. S. 523, are cited to show that the securities have some of the characteristics of fungible goods. In view of the clear intention of Congress not to include the transactions in the instant cases within the purview of Sec. 24(b)(1)(A) as demonstrated above, this similarity between securities and fungible goods is unimportant. Respondent's argument seems to be that if securities are like fungible goods a sale of 100 shares of Eastman Kodak by Susan McWilliams and the purchase of 100 shares by her son, John P. McWilliams, on the same day should be treated as though the same property were sold by her and purchased by her son, although the purchaser from Susan McWilliams and the seller to John P. McWilliams were different people and the certificates were different. The holder of a warehouse receipt for 1,000 bushels of wheat is entitled to receive from the elevator company 1,000 bushels of unspecified wheat, but the courts have never held, and no one has ever advanced the theory, that if the holder of such a receipt sells his receipt to X and shortly thereafter the holder's wife buys from Z a different warehouse receipt for 1,000 bushels of wheat stored in the same elevator the legal result is that the holder has sold his 1,000 bushels of wheat to his wife. There has been no sale, directly or indirectly, "between" them.